Matter of Robins
2018 NY Slip Op 30936(U)
May 17, 2018
Surrogate's Court, New York County
Docket Number: 2013-694/B
Judge: Nora S. Anderson

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Proceeding to Determine Apportionment of Federal and State Estate Taxes in the Estate of

ELI ROBINS,

File No. 2013-694/B

Deceased.

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A N D E R S O N , S .

This contested miscellaneous proceeding concerns the allocation of federal and state estate tax liability among the beneficiaries of the above estate. Petitioners seek an order and decree directing the fiduciaries of a post-deceased beneficiary ("Ms. L.") to pay her share of estate taxes in an amount determined by petitioners. Respondents contend that, according to their own calculations, Ms. L.'s share of the estate's tax liability is less than that proposed by petitioners.

Testator's will grants bequests to petitioners (his two daughters), to his grandchildren, and to Ms. L. In addition to her bequest, Ms. L. inherited, by right of survivorship, a condo and the proceeds of a bank account jointly owned with testator. Ms. L. died approximately two years after testator's death.

The subject will does not contain an estate-tax apportionment clause. In the absence of such a clause, EPTL 2-1.8(c)(1) provides that, "The tax shall be apportioned among the persons benefited in the proportion that the value of the property or interest received by each such person benefited bears

to the total value of the property and interest received by all persons benefited" (EPTL 2-1.8[c][1]). In other words, Ms. L.'s share of estate tax is calculated as follows: the total value of the probate and non-probate assets passing to Ms. L., divided either by the total value of testator's taxable estate (as petitioners contend) or the total value of his taxable estate plus (as respondents contend) the total value of "adjusted taxable gifts" within the meaning of the estate tax law.

The parties agree as to the value of the condo in calculating the apportionment. They disagree, however, as to (1) the value of the bank account which factors into apportionment, (2) whether the bequest to Ms. L. should be subject to apportionment, and, if so, the value to be assigned to her interest, and (3) the value to be assigned to the federal taxable estate.

The dispute as to the bank account is readily resolved, notwithstanding the theories offered by the parties to support their respective calculation of how much Ms. L. received from testator through the joint account. Instead, it is enough to note that their valuations differ from the amount determined by the taxing authorities as the value of the bank account for estate tax purposes, and EPTL 2-1.8(c)(1) explicitly provides that, in the apportionment process, "the values as finally determined in the respective tax proceedings [are] the values to be used as the

basis for apportionment of the respective taxes." Thus, in accordance with precedent, the court notes that it

> "has no jurisdiction to review a determination of the ... taxing authority with respect to what is included in the gross taxable estate ... ,[a matter] which is binding on the court.... [Therefore,] [a]pportionment is made on the property as taxed by the authorities."

(*Matter of Fried*, 132 Misc 2d 1039, 1041-42 [Sur Ct, Westchester County 1986]; *see also Matter of Metzler*, 176 AD2d 15 [4th Dept 1992]).

Based upon the foregoing, the court concludes that, in the tax-apportionment calculation, the figure to be used as the value of what passed to Ms. L. in respect of the bank account is the value finally determined by the taxing authorities.

The parties disagree as to whether Ms. L.'s legacy under Article FOURTH of testator's will must bear a share of the estate-tax liability and, if so, whether petitioners correctly value the legacy for purposes of the apportionment. Article FOURTH provides for a pecuniary bequest in trust in accordance with the following terms:

> "FOURTH: A sum computed as follows: the sum of $3,500 multiplied by the remaining life expectancy in months of [Ms. L.] at the time of my demise, to be held in trust, nevertheless, and disbursed to [Ms. L.] in monthly installments of $3,5000 commencing the first day of each month after my demise so long as she shall live. Any excess remaining after the demise of [Ms. L.] ... is to be divided by my children ... in equal parts. This gift is intended to compensate

> for the social security payments which [Ms. L.] would receive had we been married.
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> The administration of this trust will normally earn interest from the trust fund. In reporting the tax for the trust, the disbursement of the monthly sum is first from income and the balance from principal."

The parties' dispute in this connection arises in view of the following terms of EPTL section 2-1.8(b):

> "[W]hen a disposition is made by which any person is given an interest in income or an estate for years or for life or other temporary interest in any ... fund, the tax apportionable against such temporary interest and the remainder limited thereon is chargeable against and payable out of the principal of such ... fund without apportionment between such temporary interest and remainder. The provisions of this paragraph apply although the holder of the temporary interest has rights in the principal, but do not apply to a common law annuity."

Thus, whether Ms. L.'s interest under Article FOURTH is subject to apportionment depends on whether that interest is the kind described in the first four lines of the above subsection or whether it is instead a "common law annuity" within the meaning of the last line. If the interest is concluded to be a "common law annuity" and therefore subject to apportionment, there will be no need to consider whether it is "an interest in income" or an "estate for years or for life" for purposes of the statute.

The reader is cautioned that the use of the term "common law annuity" may at times be technically incorrect (*see Matter of Hastings*, 183 Misc 520, 521-522 [Sur Ct, NY County 1944]).

However, judicial precedents have unequivocally set forth the attributes of a true "common law annuity." As was stated by a Surrogate more than 80 years ago, "An annuity at common law was a yearly sum charged [against the estate] ..., 'a fixed amount directed to be paid absolutely and without contingency'" (*Matter of Johnson*, 144 Misc 60 [Sur Ct, Broome County 1932], *at 62-63, quoting Matter of McComb*, 4 *Bradf*. 151). In other words, "Where an annuity is created the annuitant is entitled to the stipulated payments per annum irrespective of the earnings" (*id.*), *i.e.*, even if the required fixed-sum payment must encroach upon principal. The fact that the fund supporting the required payments is to be held in trust in no way negates the status of the payee as an annuitant (*see, e.g., Matter of Tracy*, 179 NY 501 [1904]; *Wells v Squires*, 117 AD 502 [1st Dept 1907]; *Matter of Phipps*, 189 Misc 436 [Sur Ct, NY County 1946]). Nor does the fact that the fixed payment may be satisfied by income as well as principal negate its character as an annuity (*Matter of Gurnee*, 84 Misc 324 [Sur Ct, Westchester County 1914], *affd* 165 AD 920 [2d Dept 1914], *affd* 214 NY 660 [1915]).

Whether a beneficiary is an "annuitant" within the meaning of section 2-1.8 is ultimately a matter of the testator's intent (*Whitson v Whitson*, 53 NY 479 [1873]). If the terms of a will reflect the testator's expectation that his bequest to the payee of a fixed sum might require payment from principal, he intended

to create an annuity. Such an intent is patent in a case such as this: given the size of the initial trust fund as prescribed in Article FOURTH, in order to support the fixed monthly payments to be made to Ms. L. (totaling $42,000 per annum) the net accounting income from the fund would have had to be realized at the improbable rate of approximately 20 percent in the first year and each year thereafter until Ms. L.'s death (*compare Matter of Thomas*, 197 Misc 552 [Sur Ct, NY County 1950]; *Matter of Provot*, 188 Misc 802 [Sur Ct, NY County 1946]).

Testator's intent to create a common-law annuity is further supported by the express terms in Article FOURTH. Those terms include the disposition (to testator's daughters) of "any excess remaining" in the trust after the life-time payments to Ms. L.; the direction as to "disbursement of the monthly sum ... first from income and the balance from principal"; and testator's stated desire to give Ms. L. a substitute for the assured Social Security benefits (*i.e.*, the federal annuity) that she would have received as his spouse had they married.

The court thus concludes that the Article FOURTH bequest to Ms. L. must be subject to apportionment as a common-law annuity. Accordingly, valuation of the annuity is a necessary element in that apportionment. Respondents argue that, for purposes of the apportionment, the value of what Ms. L. received was the sum of the monthly payments distributed to her during the 26 months she

survived testator rather than petitioners' valuation based upon the actuarial tables published by the Internal Revenue Service to determine the date-of-death value of an annuity. But respondents' position is refuted by the principle applicable here and observed above, *i.e.*, in the apportionment process the valuation of interests passing from a decedent is as of the date of that decedent's death. Thus, matters post-dating decedent's death are irrelevant to the valuation.

Lastly, the parties disagree as to the value of the federal taxable estate for purposes of the estate tax apportionment calculation. Respondents maintain that adjusted taxable gifts, with a total value of almost one million dollars as reported in the Robins estate's federal estate tax return, must be included in the denominator of the fraction that is the measure of Ms. L.'s share of the federal estate tax liability of testator's estate. Although undisputedly the federal estate tax itself is based upon the sum of the taxable estate as "grossed-up" by adjusted taxable gifts, under applicable New York law the estate tax is apportioned solely against the taxable estate without such addition (see EPTL 2-1.8[a], [c]; *Matter of Metzler*, *supra*).

Settle decree in accordance with this decision. The decree proposed for settlement should reflect the extent to which amortization pursuant to case law affects the sum that

respondents must pay petitioners in respect of Ms. L.'s share of testator's estate tax (*see Matter of Blumenthal*, 182 Misc 140, 140-141 [Sur Ct, NY County 1943], *affd* 267 AD 949 [1st Dept 1944], *affd* 293 NY 707 [1944]; *see also Matter of Thomas*, *supra*).

Dated: May 17 2018

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